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Yaw Chun Soon v Newfields Land Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-7–01 OF 2019
WONG CHEE LIN J
28 JUNE 2019

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Civil Procedure — Action — Application to strike out action — Whether there were issues to be tried — Whether claim made prematurely — Whether plaintiff entitled to rescind the agreement

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This was an application by the defendant to strike out the plaintiff's claim. On 23 March 2016, the defendant had entered into a share sale agreement with the plaintiff where the plaintiff agreed to sell his 49% equity in Ardent Housing Development Sdn Bhd ('Ardent') to the defendant, made up of 245,000 ordinary shares and 4,410,000 preference shares ('shares'). As the date of the share sale agreement, the defendant already held 51% equity in Ardent. On 23 March 2016, the parties entered into: (a) a supplemental infrastructure costs share agreement ('supplemental IFCSA') between Ardent and Platinum 88 Sdn Bhd ('Platinum 88'); and (b) a settlement agreement with, inter alia, the plaintiff, the defendant and Ardent ('settlement agreement'). At the time of the share sale, Ardent was owing RM9,445,778.56 to the defendant. Pursuant to the share sale agreement, the defendant owed the plaintiff the balance purchase price totaling RM4,518,000 while the plaintiff owed Ardent the purchase price for the terrace units and townhouse amounting to RM4,518,000. Therefore, the parties agreed to set off or contra their respective debts by way of the defendant paying to Ardent the purchase price for the terrace units and townhouse on behalf of the plaintiff. The parties agreed to pay the purchase price of the shares worth RM4,655,000 in the following manner: (i) the defendant shall pay the plaintiff a sum of RM137,000 upon the execution of the share sale agreement; and (ii) the balance purchase price is to be paid by the defendant paying to Ardent the purchase price of four terrace units and one townhouse on behalf of the plaintiff. The defendant had paid to the plaintiff a sum of RM137,000 and delivered the SPAs and MOT for the terrace units executed by Ardent to the plaintiff's solicitors to be held in escrow. The defendant undertook to cause Ardent to execute the sale and purchase agreement for the townhouse within four years from the date of the sale share agreement. The share sale agreement does not stipulate the time and manner in which the sale and purchase agreement for the townhouse is to be effected. The plaintiff's claim was primarily premised on its allegation that the defendant had breached its obligations under the share sale agreement by refusing to allow the plaintiff to date the SPAs and MOT in escrow for the terrace units. The

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defendant contended: (1) that it could not have breached the share sale agreement when its obligations under the agreement was not due to be performed yet; and (2) that pursuant to the settlement agreement, Ardent had given financial assistance to the defendant in order for the defendant to purchase shares in Ardent in which the defendant is a shareholder.

Held, allowing the application:

(1) The certificate of practical completion only certified the completion of the physical works. The commissioning must come subsequently to the physical completion of the works. On this basis, the plaintiff was only entitled to date the SPAs and the MOT for the terrace units after the expiry of 24 months from 2 October 2018 being the date of the issuance of the Form QT 11. The plaintiff's claim was therefore premature (see para 20).

(2) The court did not agree with the plaintiff's contention that the fact the defendant did not have an advertising permit and developer's license for one of the terrace units at the date of the share sale agreement gave rise to an issue to be tried. The relevant time when the advertising permit and developer's license required was when the SPAs were to be dated or when Ardent's project was to be launched which was yet to happen. Until the SPA was dated, there was no sale of the properties and the question of the advertising permit and the developer's license does not come into the picture yet (see para 25).

(3) The court did not agree with the plaintiff's contention and was of the view that there was no breach of s 123 of the Companies Act 2016. The plaintiff's contention ignored the rationale of the payment arrangement as set out in the settlement agreement. Accordingly, the alleged breach of s 123 of the Companies Act 2016 was also not an issue to be tried. Therefore, it was a plain and obvious case where the plaintiff's claim should be struck out (see paras 34 & 38–39).

[Bahasa Malaysia summary

Ini merupakan permohonan defendan untuk membatalkan penyataan tuntutan plaintif. Pada 23 Mac 2016, defendan telah memasuki satu perjanjian penjualan syer dengan plaintif, yang mana plaintif bersetuju untuk menjual ekuiti 49% miliknya dalam Ardent Housing Development Sdn Bhd ('Ardent') kepada defendan, yang merupakan 245,000 syer biasa dan 4,410,000 syer keutamaan ('syer'). Pada tarikh perjanjian penjualan syer, defendan telah pun memegang 51% ekuiti dalam Ardent. Pada 23 Mac 2016, pihak-pihak telah memasuki: (a) *supplemental infrastructure costs share agreement* ('supplemental IFCSA') di antara Ardent dan Platinum 878 Sdn Bhd ('Platinum 88'); dan (b) perjanjian penyelesaian, antara lain, plaintif, defendan dan Ardent ('perjanjian penyelesaian'). Pada waktu penjualan syer, Ardent berhutang

RM9,445,778.56 kepada defendan. Selaras dengan perjanjian penjualan syer, defendan berhutang kepada plaintif baki jumlah penjualan RM4,518,000 manakala plaintif berhutang kepada Ardent untuk pembelian untuk teras dan rumah bandar berjumlah RM4,518,000. Oleh itu, pihak-pihak bersetuju untuk membuat tolakan atau kontra hutang masing-masing dengan cara defendan membuat bayaran kepada Ardent untuk harga belian unit teras dan rumah bandar bagi pihak plaintif. Pihak-pihak bersetuju untuk membayar harga jualan syer bernilai RM4,655,00 seperti berikut: (i) defendan akan membayar kepada plaintif jumlah RM137,000 atas pelaksanaan perjanjian penjualan syer; dan (ii) baki harga belian untuk dibayar oleh defendan kepada Ardent untuk harga belian empat unit teras dan satu rumah bandar bagi pihak plaintif. Defendan telah membayar kepada plaintif sejumlah RM137,000 dan menyerahkan SPA dan MOT untuk unit teras tersebut dilaksanakan oleh Ardent kepada peguam plaintif untuk dipegang secara eskrow. Defendan memberi aku janji untuk menyebabkan Ardent melaksanakan perjanjian jual beli untuk rumah bandar itu dalam tempoh empat tahun dari tarikh perjanjian penjualan syer. Perjanjian penjualan syer tidak membutirkan masa dan cara yang mana perjanjian penjualan syer untuk rumah bandar tersebut untuk dilaksanakan. Tuntutan plaintif secara asasnya berdasarkan alegasinya bahawa defendan telah melanggar tanggungjawabnya dibawah perjanjian penjualan syer apabila enggan untuk membenarkan plaintif untuk meletakkan tarikh pada SPA dan MOT secara eskrow untuk unit teras. Defendan menghujahkan: (1) dia tidak boleh melanggar perjanjian penjualan syer tersebut apabila tanggungjawabnya dibawah perjanjian belum sampai masa untuk dilaksanakan; dan (2) selaras dengan perjanjian penyelesaian, Ardent telah memberikan bantuan keewangan kepada defendan untuk defendan membeli syer dalam Ardent yang mana defendan merupakan pemegang syer.

Diputuskan, membenarkan permohonan:

(1) Sijil penyelesaian praktikal hanya mengiktiraf penyelesaian kerja fizikal. Penempahan harus datang selepas daripada penyelesaian fizikal kerja. Atas alasan ini, plaintif hanya berhak untuk meletakkan tarikh SPA dan MOT untuk unit teras selepas tamat tempoh 24 bulan dari 2 Oktober 2018 yang merupakan tarikh pengeluaran borang QT 11. Tuntutan plaintif adalah oleh itu pra-matang (lihat perenggan 20).

(2) Mahkamah tidak bersetuju dengan hujahan plaintif bahawa fakta defendan tidak mempunyai permit untuk mengiklan dan lesen pemaju untuk salah satu daripada unit teras pada tarikh perjanjian penjualan syer membangkitkan isu untuk dibicarakan. Pada masa relevan apabila permit mengiklankan dan lesen pemaju diperlukan adalah apabila SPA perlu untuk ditarikhkan atau apabila projek Ardent akan dilancarkan yang masih belum berlaku. Sehingga SPA ditarikhkan, tiada pernjualan hartanah dan persoalan permit mengiklankan dan lesen pemaju masih belum timbul (lihat perenggan 25).

(3) Mahkamah tidak bersetuju dengan hujahan plaintif dan berpendapat bahawa tiada pelanggaran s 124 Akta Syarikat 2016. Hujahan plaintif tidak menghiraukan rasional aturan pembayaran sepertimana dibutirkan dalam perjanjian penyelesaian. Oleh itu, pelanggaran s 123 Akta Syarikat 2016 yang dikatakan berlaku juga bukan satu isu untuk dibicarakan. Oleh itu, adalah merupakan kes yang biasa dan jelas yang mana tuntutan plaintif harus dibatalkan (lihat perenggan 34 & 38–39).]

Cases referred to

Audrey Gertrude De Souza v Sunway D' Mont Kiara Sdn Bhd [2015] MLJU 2117; [2015] 4 CLJ 853, CA (refd)

Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36, SC (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors [1997] 4 MLJ 329; [1997] 3 CLJ 421, HC (refd)

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309, CA (refd)

Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (refd)

Stewart Wells Hill & Robert Thomson Hill v Stewart Milne Group Ltd & Gladedale (Northern) Ltd [2016] CSIH 35; [2017] SCLR 92 (refd)

Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd [2005] 7 MLJ 590, HC (refd)

Wan Ming Sun v Planet Uno Sdn Bhd [2014] 10 CLJ 119, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) s 67

Companies Act 2016 ss 123, 124

Contracts Act 1950 s 40

Housing Development (Control and Licensing) Regulations 1989 reg 5

Rules of Court 2012 O 18 r 19(1)

Water Services Industry (Water Reticulation and Plumbing) Rules 2014 rr 29, 29(2)(c)

Water Services Industry Act 2006 s 47

Marcus Tan (Eunice Ng with him) (Ricky Tan & Co) for the plaintiff.

Bahari Yeow Tien Hong (Ho Ai Ting with him) (Lee Hishammuddin Allen & Gledhill) for the defendant.

Wong Chee Lin J:

[1] This is an application by the defendant to strike out the claim of the plaintiff. I have allowed the application. These are the full reasons for my decision.

SALIENT BACKGROUND FACTS

[2] On 21 March 2016, the defendant entered into a share sale agreement dated 2 March 2016 with the plaintiff ('share sale agreement') where the plaintiff agreed to sell his 49% equity in Ardent Housing Development Sdn Bhd ('Ardent') to the defendant, made up of 245,000 ordinary shares and 4,410,000 preference shares ('shares').

[3] As at the date of the share sale agreement, the defendant already held 51% equity in Ardent.

[4] On 21 March 2016, the following two agreements were entered into:

(a) a supplemental infrastructure costs share agreement ('supplemental IFCSA') between Ardent and Platinum 88 Sdn Bhd ('Platinum 88'); and

(b) a settlement agreement with inter alia, the plaintiff, the defendant and Ardent ('settlement agreement').

[5] The relation between the share sale agreement and the supplemental IFCSA is as follows:

(a) Ardent purchased some parcels of land from Platinum 88 at Ukay Bistari, Melawati ('lands');

(b) Ardent will be developing the lands into a housing development ('Ardent's project');

(c) at the time of the share sale agreement, the developers surrounding the lands had been tasked by Syarikat Bekalan Air Selangor ('SYABAS') to build a permanent/integrated water supply system ('PWSS') to provide permanent water supply to the developments in the vicinity of Ardent's project. The developers entered into agreements amongst themselves to build the PWSS on a cost-sharing basis ('PWSS agreements');

(d) as Ardent is not a party to the PWSS agreements and to ensure Ardent's project is fully connected and integrated to the PWSS, Ardent and Platinum 88 entered into two agreements ie infrastructure cost share agreement ('IFCSA') and the supplemental IFCSA. The net effect of the IFCS and supplemental IFCSA is that:

(i) the portion of the PWSS affecting the lands is referred to as the Integrated Water Supply System 1A & 1B ('IWSS 1A & 1B');

(ii) pursuant to the IFCSA, Platinum 88 agreed and undertook to complete and commission the IWSS 1A & 1B with certificate of completion by 31 October 2014 to enable Ardent's project to be fully connected and integrated to the PWSS for the purpose of securing certificate of completion and compliance;

(iii) as the IWSS 1A & 1B was not completed and commissioned by 31 October 2014, Platinum 88 and Ardent entered into the supplemental IFCSA to, among others, revise the scope and schedule of works for the IWSS 1A & 1B to become only Portion 1A of the IWSS 1A & 1B; and

(iv) pursuant to the supplemental IFCSA, Platinum 88 represented that Portion 1A of the IWSS 1A & 1B will be completed and commissioned with certificate of completion by 30 June 2016, otherwise, Platinum 88 is liable to pay Ardent liquidated ascertained damages in the sum of RM5,000 a day from 1 July 2016 until the Portion 1A of the IWSS 1A & 1B is completed and commissioned with certificate of completion;

(e) the parties agreed to pay the purchase price of the shares amounting to RM4,655,000 ('purchase price') in the following manner:

(i) the defendant shall pay the plaintiff a sum of RM137,000 upon execution of the share sale agreement; and

(ii) the balance purchase price totalling RM4,518,000 is to be paid to the plaintiff by way of the defendant paying to Ardent the purchase price of four units of terrace houses ('terrace units') and one unit of townhouse/villa ('townhouse') on behalf of the plaintiff.

[6] The rationale behind the payment arrangement detailed in para 2.5(b) above is stated in the settlement agreement, as can be summarised below:

(a) at the time of the share sale, Ardent was owing RM9,445,778.56 to the defendant;

(b) pursuant to the share sale agreement:

(i) the defendant owes the plaintiff the balance purchase price totalling RM4,518,000; and

(ii) the plaintiff owes Ardent the purchase price for the terrace units and townhouse amounting to RM4,518,000;

(c) therefore, parties agreed to set off or contra their respective debts by way of the defendant paying to Ardent the purchase price for the terrace units and townhouse on behalf of the plaintiff.

[7] Pursuant to cl 4.2(c) and item D para (iii) Fifth Schedule of the share sale agreement, the defendant shall cause Ardent to sign the sale and purchase agreements ('SPAs') and memorandum of transfer ('MOT') for the terrace units in favour of the plaintiff's nominee, Strategi Kemajuan Sdn Bhd ('Strategi') and deliver the same to the plaintiff's solicitors to be held in escrow.

[8] The defendant had paid the plaintiff a sum of RM137,000 and delivered the SPAs and MOT for the terrace units executed by Ardent to the plaintiff's solicitors to be held in escrow.

[9] Pursuant to item D para (v), Fifth Schedule of the share sale agreement, the defendant undertook to cause Ardent to execute the sale and purchase agreement for the townhouse in favour of the Strategi within four years from the date of the share sale agreement (21 March 2016) ie by 20 March 2020. The defendant had executed the sale and purchase agreement for the townhouse.

[10] Item D para (vi), Fifth Schedule of the share sale agreement provides that:

> By a Supplemental Infrastructure Cost Share Agreement dated 21.3.2016, it was agreed by the parties therein that the Portion 1A of the IWSS 1A & 1B shall be completed and commissioned with certificate of completion by 30 June 2016. For the purpose of computation under this clause herein, the date of 30 June 2016 or the date when the Portion 1A of the IWSS 1A & 1B shall actually be completed and commissioned with certificate of completion (if any), whichever is later, shall be referred to as the 'Entitlement Date'. Accordingly, the Vendor's Solicitors are irrevocably authorized by the parties herein to date the SPA and MOT in Escrow for the Terrace Units at any time after the expiry of 24 months from the Entitlement Date or 12 months from the launch of sale of the Project, whichever is earlier.

[11] The share sale agreement does not stipulate the time and manner in which the sale and purchase agreement for the townhouse is to be effected (eg the 'entitlement date' or the dating of the sale and purchase agreement).

LAW ON STRIKING OUT

[12] The principles on striking out of pleadings are trite — O 18 r 19(1) of the RC 2012, *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 (SC).

[13] It is settled law that a claim would be struck out if on the face of it, is

plainly and obviously unsustainable — *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corp Bhd* (SC).

[14] In *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16, the Supreme Court held that 'the lower court should have also scrutinised the evidence in order to decide whether the action was bound to fail'.

[15] In *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309, the Court of Appeal set out the guiding principles on evaluation of affidavit evidence:

> Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has not chance of success. (See *Mckay & Anor v Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890).
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> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. (See *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400). Likewise, where the affidavit evidence discloses with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

FINDINGS OF THE COURT

[16] In essence, the plaintiff's claim is primarily premised on its allegation that the defendant has breached its obligations under the share sale agreement, among others, by refusing to allow the plaintiff to date the SPAs and MOT in escrow for the terrace units.

[17] It is the contention of the defendant that it could not have breached the share sale agreement when its obligation under the agreement is not due to be performed yet.

[18] The facts below will show that the defendant could not have breached the share sale agreement when its obligation under the share sale agreement is not due to be performed yet:

(a) in so far as the terrace units are concerned, based on the terms of share sale agreement, the dating of the SPAs and MOT in escrow is conditional upon the occurrence of either of two events, whichever is earlier:

(i) the completion and commissioning of Portion 1A of the IWSS 1A & 1B with certificate of completion; or

(ii) the launch of sale of Ardent's project;

(b) it is not disputed that Ardent's project has not been launched to date;

(c) portion 1A of the IWSS 1A & 1B was handed over to SYABAS and ready to be commissioned by SYABAS on 2 October 2018 pursuant to a Form QT 11 dated 2 October 2018 issued by SYABAS;

(d) therefore, based on Item D para (vi), Fifth Schedule of the share sale agreement, 2 October 2018 is the entitlement date. The plaintiff is only allowed to date the SPAs and MOT for the terrace units after the expiry of 24 months from 2 October 2018, ie on 3 October 2020; and

(e) in so far as the townhouse is concerned, the share sale agreement does not stipulate the time and manner in which the sale and purchase agreement for the townhouse is to be effected (eg the 'entitlement date' or the dating of the sale and purchase agreement).

[19] The plaintiff contends that the entitlement date fell on 24 September 2016 with the completion and commission of Portion 1A of the IWSS 1A & 1B with a certificate of practical completion ('CPC') dated 24 September 2016. It is submitted for the defendant that such contention is misconceived for the following reasons:

(a) the entitlement date cannot be 24 September 2016 as the CPC (certificate of practical completion) is not a 'certificate of completion';

(b) the CPC only certified the completion of the physical construction works;

(c) the CPC does not state nor does it certify the commissioning of Portion 1A of the IWSS 1A & 1B;

(d) 'Commissioning' is defined by Chow Kok Fong in *Construction Contracts Dictionary* (2006, Thomson Sweet & Maxwell Asia) to mean:

> v — The activation and monitoring of the systems of a building or facility as part of a programme to determine the extent to which the systems are capable of functioning according to the requirements as prescribed in their design and to prepare the systems for their intended operation. Commissioning is usually towards the end of the construction or upon completion of the construction ...

(e) in *Stewart Wells Hill & Robert Thomson Hill v Stewart Milne Group Ltd & Gladedale (Northern) Ltd* [2016] CSIH 35; [2017] SCLR 92, the Scottish Court of Appeal, in discussing the meaning of 'completed and commissioned' held:

> [31] As already noted, parties were agreed that 'commissioned' meant 'made operational and therefore capable of being put to use by those entitled to inhabit the

houses served by the systems'. On that definition I would see the requirements of clause 2.13 as having been met as at December 2008 insofar as the 'commissioned' aspect of 'completed and commissioned' is concerned. As appears from the sheriff's findings-in-fact the systems were connected by that date and were working to drain the MTS site. On the basis of the same facts, giving the word its natural and ordinary meaning, it can also be said that the systems were 'completed'. They certainly had been physically constructed. As can be seen from chapters 4 and 5 of the Guide , the fact that the MTS systems have been connected to the public sewer means that Scottish Water has been satisfied with the design of the systems, has issued a permit to connect, has carried out a site inspection and been satisfied as to the completion of that work. Thus, looking to the natural and ordinary meaning of the phrase, it can be said that the systems were 'completed and commissioned' by December 2008. That conclusion is reinforced if it is to be inferred from the order of the words that commissioning is something that comes after completion, as would seem to make sense. What I mean by that is that the word order suggests the stage indicated by 'completed' is a stage necessarily prior to the stage indicated by 'commissioned'. As I took Mr Bartos to accept, the fact that the systems were operational meant that the 'commissioned' stage had been reached. Thus, if word order is meant to indicate time sequence, the fact that the systems have been 'commissioned' means that they must previously have been 'completed'.

[48] ... the parties had clearly reached an agreement with declared purposes focussing on the practical outcome of completed and commissioned systems, which comply with the various planning and statutory requirements for such systems ...

(f) the Form QT 11 dated 2 October 2018 issued by SYABAS is a standard form prescribed in the Tenth Schedule of the Water Services Industry (Water Reticulation And Plumbing) Rules 2014 ('WSI Rules'), read with s 47 of the Water Services Industry Act 2006 ('the WSIA').

(g) r 29 of the WSI Rules states:

29 Handing over of external water reticulation system and supply main

(1) Upon the issuance of the certificate of compliance of external water reticulation system or supply main by a qualified person under section 47 of the Act, a developer shall apply to a water distribution license in the form prescribed in the Ninth Schedule to hand over the operation and maintenance of the external water reticulation system or supply main to the water distribution licensee.

(2) Where the water distribution license is satisfied that:

(a) all requirements set out in the approved plans and specifications and the recognised standards are met;

(b) the as built drawings of the external water reticulation system or supply main certified by the qualified person have been submitted to the water distribution licensee; and

(c) the external water reticulation system or supply main has been completed and every part thereof is in proper working order and where applicable, the necessary spares for any pumping equipment

> have been supplied, the water distribution license shall accept the handing over of the external water reticulation system or supply main at no cost for use as a public water supply system by issuing the form prescribed in the Tenth Schedule to the developer.

(h) therefore, reading the definition/meaning of 'commissioning' and r 29(2)(c) of the WSI Rules, it would appear that the issuance of Form QT 11 by SYABAS has three significance:

(i) SYABAS is satisfied that Portion 1A of the IWSS 1A & 1B has been completed and every part thereof is in proper working order;

(ii) Portion 1A of the IWSS 1A & 1B has been handed over to SYABAS; and

(iii) Portion 1A of the IWSS 1A & 1B is 'commissioned' in that the systems are capable of functioning according to the requirements as prescribed in their design and ready for their intended operation.

(i) based on the foregoing, it is submitted for the defendant that the date of 'commissioning' is the date of the issuance of Form QT11 ie 2 October 2018 where Portion 1A of the IWSS 1A & 1B was handed over to SYABAs or anytime thereafter, signifying that Portion 1A of the IWSS 1A & 1B was completed and every part thereof is in proper working order and capable of functioning according to the requirements as prescribed in their design and ready for their intended operation.

(j) accordingly, based on Item D para (vi), Fifth Schedule of the share sale agreement, 2 October 2018 is the entitlement date. The plaintiff is only allowed to date the SPAs and MOT for the terrace units after the expiry of 24 months from 2 October 2018, ie on 3 October 2020.

[20] If the only possible dates for completion and commissioning of Portion 1A of the IWSS 1A & 1B are the date of the certificate of practical completion and the date of the Form QT 11, and the parties had confirmed to me that the applicable date can only be one of the two dates, I am of the view that the latter date would be the applicable date. The certificate of practical completion only certified the completion of the physical works. The commissioning must come subsequently to the physical completion of the works. On this basis, I am of the view that the plaintiff is only entitled to date the SPAs and MOT for the terrace units after the expiry of 24 months from 2 October 2018 ie on 3 October 2010. On this basis, the plaintiff's claim would be premature.

[21] However, the plaintiff has raised other issues which it submits should go for trial. I will now consider those issues.

[22] The plaintiff alleged that the defendant did not have any advertising permit and developer licence for Lot 1706 which is one of the terrace units on the date of the share sale agreement and/or the settlement agreement. Pursuant to reg 5 of the Housing Development (Control and Licensing) Regulations 1989, no advertisement or sale shall be made by any housing developer without an advertisement and sale permit having first been obtained from the controller.

[23] The plaintiff relied on the case of *Wan Ming Sun v Planet Uno Sdn Bhd* [2014] 10 CLJ 119 wherein the Court of Appeal held as follows:

> [13] ... It is plain and obvious that the plaintiff was collecting in advance the purchase price which it was prohibited from collecting under reg 11. The option fee is therefore a guise to circumvent the mandatory requirement of reg 11(2). That being the case, it is clear that the option for sale is an agreement prohibited by law.
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> [14] It matters not that the payment was placed with the stakeholder as contended by counsel for the plaintiff. The fact as contended by the plaintiff, that despite becoming aware of such arrangement, the Housing Ministry takes no action on the plaintiff, does not make an illegal contract to become legal. Consideration which is forbidden by law is not lawful as provided under s 24 of the Contracts Act. An agreement with unlawful consideration and whose object is unlawful is void and unenforceable under s 25 of the Contracts Act.
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> [15] In *MK Retnam Holdings Sdn Bhd v Bhagat Singh* [1985] 2 MLJ 212; [1985] 1 CLJ 520; [1985] CLJ Rep 199; the Supreme Court held that an agreement which is in violation of the letter and spirit of the Housing Developers (Control and Licensing) Rules 1970 should not be allowed to stand. The option to sell agreement in the present case is in our view an agreement whose admitted aim was to defeat the object of the regulation and should not be enforced by the court.

[24] The defendant relied on the Court of Appeal case of *Audrey Gertrude De Souza v Sunway D' Mont Kiara Sdn Bhd* [2015] MLJU 2117; [2015] 4 CLJ 853 which held that a decision to render the contract between the parties null and void because of a contravention of the regulations would not serve the object of protecting the purchaser:

> In this case, use of Form H instead of Form G was a contravention as to the form of the SPA to be used for the contract between the parties for the purchase of the bungalow and courtyard property. However, the contravention did not go to the substance of the contract. The mandatory language of reg 11(1) of the Regulations prescribing the use of Form G or Form H did not extend to declaring that the contract under any other form other than Form G or Form H would render it null and void. Instead s 22 provides that a contract was not voidable because it was caused by a mistake as to any law in force in Malaysia such as when the wrong form was used. Since the contravention as to the form to be used did not affect the object of the contract between the parties, being the delivery of a bungalow with a courtyard on Lot 16 as contracted, the contravention did not render the contract between the parties to be null and void.

Under s 24 of the Act, the Minister was given the discretion to make the Regulations for the purpose of carrying into effect the provisions of the Act. The purpose of the Act was to provide for the control and licensing of the business of housing development in Peninsular Malaysia with provisions designed to protect the purchaser and to ensure delivery of the house or unit contracted for. As such, a decision to render the contract between the parties null and void because of a contravention of the Regulations would not serve the object of protecting the purchaser and ensuring delivery of the house in accordance with the contract.

[25] I do not agree with the plaintiff's contention that the fact the defendant did not have an advertising permit and developer's license for one of the terrace units (PT 1706) at the date of the share sale agreement gives rise to an issue to be tried. The relevant time when the advertising permit and developer's license is required is when the SPAs are to be dated or when Ardent's project is to be launched which has yet to happen. It is provided in the share sale agreement that the balance purchase price shall be a debt due and owing to the vendor by the purchaser until the vendor is in receipt of the same in the mode and manner as described and detailed in the Fifth Schedule. And in the Fifth Schedule it is contemplated that the defendant shall pay the purchase price for the properties after the SPA and MOT are dated because it is only then that the sale and purchase agreements will have come into existence. And the relevant date is 24 months from the date when the Portion 1A of the IWSS IA shall actually be completed and commissioned or 12 months from the launch of sale of the Project, whichever is earlier. Until the SPA are dated, there is no sale of the Properties and the question of the advertising permit and the developer's license does not come into the picture yet.

[26] The plaintiff further contended that the defendant had admitted that it had made an application to change the building plan and this has the effect of disabling the defendant from performing the terms of the share sale agreement. The defendant does not deny that it had applied for approval of the change of the building plan and has said that the approval affected the terrace units. It is the contention of the plaintiff that the defendant has thereby disabled itself from performing the terms of the share sale agreement as the change of plan will change the terrace houses from 2 1/2 storeys to 3 storeys. The defendant merely responds to say that the plaintiff's contention that the defendant is unable to fulfil its obligations under the share sale agreement is speculative. The defendant has shown that the conditional approval of the change of plan was only valid for a year which has expired already on 30 October 2018. The plaintiff submitted that the defendant in its affidavits did not aver that the approval had already expired but that fact can clearly be seen from the approval letter itself which is an exhibit. Accordingly, at this juncture, there can be no change of building plan as the approval had lapsed and the contention that the defendant is unable to fulfil its obligations under the share sale agreement is speculative.

[27] If the defendant had really disabled itself from performing the terms of the share sale agreement with regard to the terrace units, would the plaintiff be entitled to rescind the agreement?

[28] In *Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd* [2005] 7 MLJ 590, it was held as follows:

> [41] In my judgment, the resolution to the above diverging submissions may be found by restating the cardinal principles which the courts have applied in order to determine whether in a particular situation there is a fundamental breach or a breach of a fundamental term and for the purposes of this judgment, I shall use both of these expressions interchangeably:
>
> (a) The concept of fundamental breach is common law in origin;
>
> (b) This common law has to a great extent now found expression in statutory form in s 40 of the Contracts Act 1950 (s 40) which reads as follows;
>
> (c) When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promise may put an end to the contract unless he has signified, by words or conduct his acquiescence in its continuance.
>
> (See also *Hwa Chee Lin* at p 551 per Suriyadi J.)
>
> The question whether or not a breach is fundamental may be found by referring to two alternatives viz the importance that the parties would seem to attach to the term which has been broken or to the seriousness of the consequences that have in fact resulted from the breach, and both these alternatives may have a part to play as the decisive element or elements: see *Cheshire, Fifoot and Furmston's Law of Contract* (2nd Ed) by Andrew Phang Boon Leong p 898;
>
> Application of the first test calls for and depends on the construction of the contract in question, at the time when it was made, the surrounding circumstances and the intention of the parties, as gathered from the instrument itself: ibid p 898 and *Bentsen v Taylor, Sons & CO (No 2)* [1893] 2 QB 274 at p 281 per Bowen LJ.
>
> ...
>
> (7) In Malaysia the test of essentiality has been expounded by Visu Sinnadurai (later J) in *The Sale and Purchase of Real Property in Malaysia 1984* at pp 345 and 346 where it was stated that a party to a sale of land may rescind the contract if the other party has breached an essential obligation of the contract for sale and that the essential obligations of a vendor include the delivery of a property as described in the contract.
>
> (8) A breach of an essential term of the contract goes to the root of the contract and entitles the injured party to rescind and recover the payment made under the contract for failure of consideration: s 34(1)(a) of the Specific Relief Act 1950; *The Law of Restitution* by Lord Goff and Gareth Jones, 1993 p 417; *Hwa Chee Lin* per Suryadi J; *Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor* [1999] 5 MLJ 670 per Kamalanathan Ratnam J; and *Lee v Rayson* [1917] 1 Ch 613.

[29] The plaintiff's claim is premised on s 40 of the Contracts Act 1950 which provides that: 'When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance'.

[30] In *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269, the Court of Appeal said this:

> Special attention should be paid to the phrase 'his promise in its entirety'. Under the section the right in a non-defaulter to repudiate a contract only accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. If there is part performance by the defaulting party, the innocent party may not put an end to the contract.

[31] In the present case, assuming the defendant has disabled itself from performing its obligations under the share sale agreement in respect of the terrace units, the defendant would still have partially performed its obligations under the share sale agreement in paying the sum of RM137,000 to the plaintiff and in fulfilling its obligations in respect of the townhouse. In that case, the plaintiff should not be entitled to rescind the share sale agreement.

[32] Lastly, the plaintiff alleged that the defendant had breached s 123 of the Companies Act 2016. This provides that a company shall not give any financial assistance, whether directly or indirectly and whether by means of a loan, guarantee or the provision of security or otherwise, for the purpose of or in connection with a purchase or subscription made or to be made by any person or for:

(a) any shares in the company; or

(b) in the case where the company is a subsidiary, any shares in its holding company or in any way purchase, deal in or lend money on its own shares.

[33] The plaintiff contends that pursuant to the settlement agreement, Ardent had given financial assistance to the defendant in order for the defendant to purchase shares in Ardent in which the defendant is a shareholder.

[34] I do not agree with the plaintiff's contention. I am of the view that there is no breach of s 123 of the Companies Act 2016. The plaintiff's contention ignores the rationale of the payment arrangement as set out in the settlement agreement which can be summarised as follows:

A (a) at the time of the share sale agreement, Ardent was owing RM9,445,778.56 to the defendant;

(b) pursuant to the share sale agreement;

(c) the defendant owes the plaintiff the balance purchase price totalling
B RM4,518,000; and

(d) the plaintiff owes Ardent the purchase price for the terrace units and townhouse amounting to RM4,518,000.

C **[35]** Therefore the parties agreed to set off or contra their respective debts by way of the defendant paying to Ardent the purchase price for the terrace units and townhouse on behalf of the plaintiff.

[36] In *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329; D [1997] 3 CLJ 421, Augustine Paul J (as he then was) held:

> [4] ... Accordingly, if the transaction was a bona fide commercial transaction entered into in good faith, the fact that the proceeds of the transaction was used to assist in acquiring the company's shares would not make the transaction illegal.

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[37] Even if there is breach of s 123, s 124 provides that if a company gives financial assistance in contravention of this subdivision, the validity of the financial assistance and of any contract or transaction connected with the financial assistance is not affected only because of the contravention. In *Datuk* F *Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329; [1997] 3 CLJ 421, it was held that any transaction entered into in breach of s 67 of the Companies Act 1965 (which is in pari materia with s 123 of the Companies Act 2016) would still be valid and enforceable. This is what the court said:

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> [6] Section 24 of the Contracts Act 1950 provided that if an agreement was forbidden by law or prohibited by law or was of such a nature that it would defeat the law, that agreement would be unlawful and void. However, a contract which is prohibited by statute does not become void and unenforceable if the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. Section 24 cannot then apply to such a H contract as the statute itself had saved the contract which would otherwise be forbidden. It is only in a rare situation in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable. Section 67 is one of the instances of such rare exercise of legislative power. The Court held that as s 67(3) prescribed penalties for a breach of s 67(1) and s 67(6) provided remedies for I the breach and, furthermore, having regard to the context and purpose of s 67(1) any transaction entered into in breach of the section would be valid and enforceable. In the circumstances, the transaction in this case does not become void and unenforceable.

[38] Accordingly, the alleged breach of s 123 of the Companies Act 2016 is also not an issue to be tried.

[39] In all the circumstances of the case, I am of the view that this is a plain and obvious case where the plaintiff's claim should be struck out. I have therefore allowed the application to strike out the plaintiff's action.

Application allowed.

Reported by Izzat Fauzan